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NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

TERRY MAY,

Petitioner

versus

TRANSWORLD DRILLING COMPANY,
LITTON SYSTEMS, INC.,
KEYES OFFSHORE, INC., AND
HUTHNANCE DRILLING COMPANY,

Defendants

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the lower court err in holding as a matter of law that even with admitted diversity jurisdiction since Plaintiff was injured on land that he was unable to pursue a negligence claim under 33 U.S.C. §905(b) [hereinafter Section 905(b)].

2. Did the lower court err in not holding as a matter of law that a vessel within the meaning of 33 U.S.C. §905(b) includes a partially constructed vessel on which individuals covered by the LHWCA are working.

3. Did the lower court err in not holding as a matter of law under the contracts applicable to the construction of the vessels for Huthnance, Keyes and Transworld, that Litton was an entity subject to suit under 33 U.S.C. §905(b).

4. Do the facts support Petitioner's claim that the Defendants Litton, Huthnance, Keyes and Transworld were negligent as a vessel under 33 U.S.C. §905(b).

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HUTHNANCE DRILLING COMPANY,

Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

Petitioner prays for a writ of certiorari to review the judgment of the United States Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, Southern Division, which is not reported, is reproduced in Appendix A. The opinion of the United States Fifth Circuit Court of Appeals is reported at 786 F.2d 1261 and is reproduced in Appendix B.

JURISDICTION

The judgment of the United States Fifth Circuit Court of Appeals was entered on April 11, 1986. The jurisdiction of this court to review said denial is invoked under 28 U.S.C.A. 1254(1).

PERTINENT STATUTORY PROVISIONS

33 U.S.C.A. §902 (1978) (current version at 33 U.S.C. §902 [1978 & Supp. 1985])

Definitions
When used in this chapter –

(1) The term "person" means individual, partnership, corporation, or association.

. . . . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock,

terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

. . . . .

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C.A. §903(a)

Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

"Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

33 U.S.C.A. §905(b)

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

Several weeks prior to February 14, 1981, a part of a vessel fell and injured Patricia Smith, a Litton Systems, Inc. employee. At the time of the accident Patricia Smith was working in the same area where Terry May was subsequently injured on February 14, 1981. As a result of this accident Litton Systems, Inc. adopted a special safety regulation requiring that all free-standing vessel parts be properly braced or tacked in a manner that would prevent them from falling and injuring employees working in the area.

Terry May was employed by Litton Systems, Inc. to help construct the vessels for Huthnance Drilling Company, Keyes Offshore, Inc., and Transworld Drilling Company. On Saturday, February 14, 1981, at approximately 9:00 p.m. at night, Terry May and other Litton supervisors and employees were working overtime because they were behind in their production schedules for the vessels Litton had contracted to build for Huthnance, Keyes and Transworld. Terry May was assigned to work with a make-shift crew assembled to perform the overtime work and, therefore, was not working with his regular crew. Litton's supervisors were present and pushing and rushing the shipfitters and other Litton employees to perform their work in a hurried manner. There was poor lighting in the area where Terry May was working, making it extremely difficult for Terry May and the other workers to see in order to perform their work.

Sometime prior to February 14, 1981, Dennis Weeks, the crane operator working with Terry May's make-shift crew, had broken his right hand and his hand had been placed in a cast. Dennis Weeks had been allowed to return to light duty work since he was right handed. However, Litton's supervisors instructed Dennis Weeks to perform heavy work and required him to operate the crane which was being used by

Terry May and other members of his crew to move the vessel parts.

As a part of his duties with Litton, Terry May was instructed by Litton's supervisors to work with the crane to move certain large pieces of fabricated steel to be installed on legs of the vessels which were being constructed for Transworld, Keyes and Huthnance. A large piece of fabricated steel to be installed on the legs of one of the vessels which was being constructed for Transworld, Keyes and Huthnance and which was standing vertically and which had not been braced or tacked and which was not being worked on at the time by Terry May or any other Litton employee fell on Terry May, crushing both of his legs which resulted in the amputation of his right leg below the knee and a compound fracture of the middle third tibia and has caused Terry May to become totally and permanently disabled.

Petitioner was covered by LHWCA and has been and is receiving payment of compensation benefits under LHWCA. (Emphasis added)

Petitioner's claim against Litton under 33 U.S.C. §905(b) was dismissed because the court held that 905(b) applied only to maritime torts, that is to torts cognizable under the admiralty jurisdiction of the Federal courts. The court applied the test for admiralty jurisdiction enunciated by this court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

REASONS FOR GRANTING THE WRIT

1. THE LOWER COURT ERRED IN HOLDING THAT AS A MATTER OF LAW THAT DESPITE THE EXISTENCE OF DIVERSITY JURISDICTION THAT SINCE PETITIONER WAS INJURED ON LAND, HE WAS UNABLE TO PURSUE A NEGLIGENCE CLAIM UNDER 33 U.S.C. SECTION 905(b).

The lower court erred for the following reasons:

(1) Section 905(b) of the LHWCA provides in part as follows:

> "(b) *Negligence of vessel*
> *In the event of injury to a person covered under this chapter* caused by negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title . . ." (Emphasis added)

(2) Section 903(a) of the LHWCA provides as follows:

> "903. *Coverage*
> (a) *Disability or death; injuries occurring upon navigable waters of United States*
> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoin-

> ing area customarily used by an employer in loading, unloading, repairing, dismantling, *or building a vessel*)." (Emphasis added)

It is undisputed that Petitioner at the time of his injuries was covered by the LHWCA and has been and is receiving compensation benefits under the LHWCA.

Therefore, under the clear, plain language of 905(b), Petitioner has the right to maintain this action based upon the alleged negligence of the vessel, and since there is diversity of citizenship between the parties, the District Court has jurisdiction of the parties and subject matter of this cause; and

(3) As stated by the Supreme Court of the United States in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 101 S.Ct. 1615 (1981), Petitioner has a statutory negligence action against the ship under Section 905(b). We quote from the opinion in *Scindia*, Page 1621, as follows:

> "The 1972 Amendments, particularly by adding Section 905(b), radically changed this scheme of things. The compensation payments due the longshoreman from the stevedore for injuries incurred in the course of his employment were substantially increased; the longshoreman's right to recover for unseaworthiness was abolished; *his right to recover from the shipowner for negligence was preserved in Section 905(b), which provided a statutory negligence action against the ship*; and the stevedore's obligation to indemnify the shipowner if the latter was held liable to the longshoreman was abolished." (Emphasis added)

and,

(4) Because this issue was specifically addressed by the Fifth Circuit in *Trussell v. Litton Systems, Inc.*, 753 F.2d 366 (5th Cir. 1985). In *Trussell* the accident occurred while Petitioner was working on an incomplete vessel located on land and the court stated in a footnote that:

> "We specifically note that federal jurisdiction of plaintiffs' action under 33 U.S.C. §905(b) and Mississippi law is founded on diversity of citizenship. We are in complete agreement with *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (5th Cir. 1984), that a suit under 905(b) for injury to a shipbuilder on a partially completed vessel located on land does not invoke the court's admiralty and maritime jurisdiction. *Since the parties in this case are diverse, however, federal jurisdiction was never in question.*" (Emphasis added)

As shown by the quotation which appears above, the *Trussell* case provides that if the parties are diverse as in this case and the jurisdictional amount is met, then Federal jurisdiction exists for an action under Section 905(b).

The Fifth Circuit in its opinion in this case attempted to reconcile its decisions in *Trussell*, supra, and *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980) and *Hall v. Hvibe Hull No. 3*, 746 F.2d 294 (5th Cir. 1984) with its decision in *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (5th Cir. 1984) by simply stating that Section 905(b) permits only the assertion of a claim for a maritime tort. To support this conclusion the Fifth Circuit cited the First Circuit decision in *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), wherein the court stated that

905(b) "*implicitly* requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute." (Emphasis added) The Fifth Circuit in accepting this rationale proceeded to hold that under 905(b) an injury must occur on navigable waters so that a maritime tort would exist which could be covered by the statute. However, this is an erroneous assumption by both the First and Fifth Circuits since as shown above the language of the statute does not limit 905(b) claims to maritime torts that occur solely on navigable waters.

The Fifth Circuit ignored the fact that Petitioner fully met both the "situs" and "status" tests of the Longshoremen's Act. As stated above, it was stipulated by the parties that Petitioner was covered by the LHWCA at the time of his accident. In order to satisfy the "situs" test of the Longshoremen's Act the injury to a worker must have occurred upon "the navigable waters of the United States," which are defined to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. §903(a); *Northeast Marine Terminal Co., Inc. v. Caputo*, *supra*, 432 U.S. at 279, 97 S.Ct. at 2365. To meet the "situs" requirement, an "adjoining area" within the meaning of the Longshoremen's Act must have a nexus with navigable waters. See *Alford v. American Bride Division, United States Steel Corporation*, 642 F.2d 807, 813 (5th Cir. 1981), modified in part, 655 F.2d 86, modified in another part, 668 F.2d 791, cert. denied, 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 472 (1983).

Petitioner submits that in viewing the evidence in a light most favorable to Petitioner there exists a sufficient nexus with navigable waters to find that the location of the accident was a covered "situs." Litton's entire work site was adjacent to navigable waters. The worksite further was being used for

loading, repairing or building platforms to be transported by navigable waters for use on navigable waters. Therefore, since Petitioner met the "situs" test under the facts of this case and also met the requirement of "status" it was error for the Fifth Circuit to hold that Petitioner did not have a cause of action under 905(b) simply on the basis that his accident did not occur on navigable waters per se. As stated above under the LHWCA "navigable waters" includes the area where Petitioner was working.

The Fifth Circuit also cited *Christoff*, supra, and *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976), in support of its position that because the accident occurred on land a Section 905(b) claim cannot be maintained. However, *Christoff* and *Parker* simply dealt with whether or not the court had Federal subject matter jurisdiction over a 905(b) claim where the injury occurred on land. Since in *Christoff* and *Parker* there was evidently no diversity jurisdiction, the court held that the 905(b) action was not within the admiralty or maritime jurisdiction of the Federal courts and ordered the cases dismissed for want of jurisdiction. In the subject case, Litton has stipulated that the court has diversity jurisdiction so neither *Christoff* nor *Parker* has application to the case at bar.

The Fifth Circuit erred in its analysis of *Parker* since it concerned, as in *Christoff*, only whether or not the Federal Court had jurisdiction of the claim on any of the following bases: "(1) admiralty and general maritime law under 28 U.S.C. § 1333; (2) the admiralty extension act 46 U.S.C. § 740; (3) the 1972 amendments to the LHWCA; and (4) 28 U.S.C. § 1337. *Diversity was not presented as a basis for jurisdiction*. The accident occurred on a ramp located on land and the Court held that neither admiralty nor maritime jurisdiction existed. The Court further held that Section 905(b):

> "eliminates only an injured worker's rights to bring actions against third parties based on unseaworthiness, and preserves his right under prior law to recover for third party negligence . . . the relevant legislative history . . . leaves little doubt that Congress did not intend Section 905(b) to create a new or broader cause of action in admiralty. . ." 537 F.2d at 117

It was decided that because Section 905(b) did not create a new negligence cause of action but merely preserved an injured's worker's right to recover damages from third parties in accordance with non-statutory negligence principles, it did not serve as a basis for jurisdiction.

This specific issue was addressed by the Fifth Circuit in *Trussell*. In *Trussell* the same defendant present in this case Litton Systems, Inc., had argued the lack of admiralty and maritime jurisdiction since the accident occurred on land. The Fifth Circuit in that case specifically recognized this fact, but still held that since diversity jurisdiction existed in the case, the 905(b) action could be maintained. The comment by the Fifth Circuit in its footnote actually considered the *Christoff* decision and stated as follows:

> "We specifically note that federal jurisdiction of plaintiffs' action under 33 U.S.C. § 905(b) and Mississippi law is founded on diversity of citizenship. We are in complete agreement with *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (5th Cir. 1984), that a suit under 905(b) for injury to a shipbuilder on a partially completed vessel located on land does not invoke the court's admiralty and maritime jurisdiction. *Since the parties in this*

case are diverse, however, federal jurisdiction was never in question." (Emphasis added)

The decisions in *Christoff* and *Parker* are not in any manner inconsistent with the Fifth Circuit's decision in *Trussell* since, as noted by the Court in the *Trussell* case, diversity jurisdiction was present for the Court to proceed with a 905(b) action.

No requirement is included in Section 905(b) that a claim to be cognizable under the statute must be based on an injury that occurs on navigable water. If Congress had intended to limit Section 905(b) claims to maritime torts, it would have been a simple matter for the language to have been incorporated at the time the statute was enacted. With no specific restriction, Petitioner submits that the statute should be liberally construed as providing him with a cause of action under all the facts and circumstances surrounding the accident and his resulting injuries. Failure of this court to correct the Fifth Circuit decision will result in a precedent that will effectively deprive the majority of claimants under the LHWCA of the cause of action which Congress intended for them to have under Section 905(b).

Again as stated above under the clear plain language of Section 905(b), Petitioner has the right to maintain this action based upon the alleged negligence of the vessel and since there is diversity of citizenship between the parties the lower court has jurisdiction of the parties and the subject matter of this cause.

2. THE FIFTH CIRCUIT ALSO ERRED WHEN IT FAILED TO FIND THAT PETITIONER WAS WORKING ON A VESSEL WITHIN THE MEANING OF SECTION 905(b) SINCE HE WAS WORKING ON A PARTIALLY CONSTRUCTED VESSEL AND HE WAS COVERED BY THE LHWCA.

The initial observation, when straining to bring into focus a workable definition of the term "vessel," is that the courts have consistently and uniformly insisted upon a liberal construction.

In *McCarthy v. The Bark Peking*, 716 F.2d 130 (2nd Cir. 1983), the defendant claimed that the "Bark Peking," a museum piece with the rudder welded into one position, was not a "vessel" within the meaning of Section 905(b).

In characterizing the Defendant's position as "an unsupported narrowing of the term 'vessel' as it is used in the Act," the Second Circuit held the Bark Peking to be a vessel, even though "no rational person would suggest that the Peking is in a position gracefully to 'slip her moorings, ease into the harbor and head for the open seas. . .' " *Id.* at 135.

The *McCarthy* court further clarified its liberal construction of the term "vessel" by stating that "a craft need not be actually engaged in navigation or commerce in order to come within the definition of 'vessel'." *Id.* at 135.

The Fifth Circuit has made it crystal clear that Section 905(b) may be applied, even if the structure is not capable of floating, if the injured party is a shipbuilder. This issue was decided by the Fifth Circuit in *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980). The *Lundy* court, faced with the "incomplete vessel" argument, stated:

The district court held that an incomplete ship was not a vessel for purposes of Section 905(b). We disagree.

The definitional section of the LHWCA provides that "[t]he term 'vessel' means any vessel upon which or in connection with which a person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment. . ." 33 U.S.C.A. § 902(21) (West 1978). Persons entitled to benefits under the LHWCA are "employees." See *id* § 903(a). "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . ." *Id.* §902(3). We have previously held that "[s]hipbuilders who do the initial work to construct a vessel for launching are just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship." *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc., v. Morgan*, 551 F.2d 61 (5th Cir. 1977). Thus, incomplete ships upon which 33 U.S.C. § 902(3) employees are working at a site which the coverage of the Act, 33 U.S.C. § 903, are vessels within the meaning of 33 U.S.C. § 902(21). The USS Hewitt was thus moored to the statute. (Emphasis added)

The rationale followed by the *Lundy* court was affirmed by the Fifth Circuit in *Hall v. Hvibe Hull No. 3*, 746 F.2d 294 (5th Cir. 1984). *Hall* involved three suits brought by employees of shipbuilders against the vessel and vessel owners under 33 U.S.C. 905(b) for injuries sustained while working on incomplete vessels. The district court had granted summary judgment holding that the hulls being worked on were not vessels under 905(b). The Fifth Circuit reversed stating that the *Lundy* definition of vessel for purposes of 905(b) controlled:

> By its terms, § 905(b), enacted by the 1972 revision of the Act, recognizes that an Act-covered employee injured while working on an uncompleted vessel is entitled to assert a negligence action against it or its owner. . .
>
> Thus, *Lundy's* rationale and holding–controlling as to the three cases now before us–is consistent both with principles expressed by relevant jurisprudence of court and with the statutory intent of § 905(b).

Although there was some speculation that this decision in *Hall* would be reconsidered, the Fifth Circuit denied the suggestion for rehearing en banc on January 29, 1985.

The decision in *Lundy* was reaffirmed by the 5th Circuit in *Trussell v. Litton Systems, Inc.*, 753 F.2d 366, (5th Cir. 1985). In that case Litton had asserted an argument identical to the one being made now in this case and the *Trussell* court rejected the argument and the rationale and authorities offered by Litton's counsel. In *Trussell* the accident occurred while the Petitioner was working to construct a vessel on a building platform in a buildingway within the shipyard.

The district court had dismissed plaintiff's action under Section 905(b) on three grounds–one of which was the finding that the incomplete hull was not a vessel. The Fifth Circuit again rejected this finding of fact by the district court in the following manner:

> We first consider the district court's holding that LHA-5 was not a vessel for the purposes of 33 U.S.C. § 905(b). We agree with the appellant that the district court erred in failing to apply the teaching of *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980). In *Lundy* we held that "vessel" has a special meaning under the LSHWA because the term is defined in the Act.

At this point the Fifth Circuit included a footnote in order to set out the pertinent section of the LSHWA which defines "vessel" for all actions under Section 905(b). The footnote as it appears in giving this definition of "vessel" states:

> The definition section of the LSHWA provides that "[t]he term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment. . ." 33 U.S.C. § 902(21) (West 1978).

After citing the definition of "vessel," the Fifth Circuit continued and stated its conclusion that had been reached in the *Lundy* case as follows:

> *We concluded that a vessel for the purposes of LSHWA includes any partially-constructed vessel on which individuals covered under the act are working. Lundy, supra, at 592. Under the Lundy test, LHA-5 is a vessel for the purposes of an action under section 905(b) and the district court's contrary conclusion is erroneous.*
> (Emphasis added)

Petitioner submits that under *Lundy*, *Hall* and *Trussell* since he was also working on a partially-constructed vessel he should be allowed to proceed with his 905(b) action against Litton.

3. THE COURT OF APPEALS ALSO ERRED IN NOT FINDING THAT LITTON WAS AN ENTITY SUBJECT TO SUIT UNDER 33 U.S.C. SECTION 905(b) UNDER THE CONTRACTS APPLICABLE TO THE CONSTRUCTION OF THE VESSELS FOR HUTHNANCE, KEYES AND TRANSWORLD.

By its express language, Section 905(b) is available to persons covered by the LHWCA who suffer injury "caused by the negligence of a vessel. . ." The threshold inquiry is thus to determine who or what may be a negligent "vessel" under Section 905(b). Fortunately, this question is answered by the act itself.

> The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 902(21).

Therefore, there are nine entities whose negligence may trigger liability under Section 905(b):

1. The vessel itself;

2. The vessel's owner;

3. The vessel's owner pro hac vice;

4. The vessel's agent;

5. The vessel's operator;

6. The vessel's charter or bare boat charterer;

7. The vessel's master;

8. The vessel's officer; and

9. The vessel's crew member.

Once vessel negligence is found; then, as expressly provided by Section 905(b), the injured party "may bring an action against such vessel as a third party. . . "

Litton would limit the nine entities, which may be held accountable under Section 905(b), to two:

1. The vessel's owner, and

2. The vessel's owner pro hac vice.

Assuming Litton's position to be correct, which it is not, Petitioner charges that Litton was indeed the owner of the vessels on Februrary 14, 1981.

Each of the vessel construction contracts contained the following provision concerning the title to the vessel:

> Title to the vessel to the extent complete, including all materials, machinery, and equipment destined for incorporation therein whether located at the builders yard or elsewhere shall immediately vest in the owner on account of and to the extent of payment made therefor to the builder by the

> owner free and clear of any claim or lien of the builder in respect to the work so paid for except as otherwise provided in this contract. Provided, however, that the vesting of title shall not relieve the builder of its obligation to replace damaged or defective materials at Builders expenses and to complete and deliver the vessel in accordance with the provisions of this contract and provided further that the Builder shall have a lien against the vessel including said materials, machinery and equipment to the extent of any unpaid balance of the contract price due the Builder hereunder. The Builder shall bear the risk of loss of all materials and the vessel until the completed vessel is delivered to and accepted by the Owner as provided for in the Contract.

And each of the contracts also included the following provision concerning insurance and risk of loss:

> (a) The Builder, at its own expense, shall from the time the first materials destined for inclusion as a part of the Vessel become at risk in the shipyard and until the Vessel has been delivered to and accepted by the Owner, keep the Vessel and all materials, outfit, equipment, and appliances to be installed on or in the Vessel, including all materials, outfit, equipment, and appliances furnished by the Owner for and used or to be used in the construction thereof, fully insured under full form (including pre-keel) Marine Builder's Risk Policies, under acceptable insurance policies, or under the Litton Self-Insurance Plan, including loss or damage caused by

> strikers, or persons taking part in labor disturbances, riot or civil commotion, and Protection and Indemnity clause including loss of life and personal injury coverage. Such insurance shall include the value, as determined from time to time by the Owner, of all materials, outfit, equipment, and appliances furnished by the Owner. The amount of insurance, the terms of the policies, the insurance companies, the underwriters, or the plan of self-insurance shall at all times be reasonably satisfactory to the Owner. *All policies shall be taken out in the name of the Builder and the Owner and all losses under such policies shall be payable to the Builder and the Owner as their respective interests may appear.*
> (Emphasis added)
>
> * * *
>
> (d) *The Owner shall assume all risk of loss with respect to the Vessel and all materials, outfit equipment and appliances installed on the Vessel upon delivery to and acceptance of the Vessel by the Owner.*
> (Emphasis added)

Litton in its brief before the Fifth Circuit claimed that the above-stated provisions caused title to pass from it to the other contracting party; however, Litton has stipulated that it cannot determine and can offer no proof that the part of the vessel which fell on Petitioner has been paid for. Thus, absent proof of payment, under the contract, title remained in Litton and it would be the owner for purposes of this 905(b) action.

Even if the court assumes that payment has been made, we submit that the contract clearly shows that Litton was the owner or co-owner of the vessel. A contract provision strikingly similar to the one at hand was reviewed by the Fifth Circuit in *Hall v. Hvibe Hull No. 3*, 746 F.2d 294 (5th Cir. 1984). The *Hall* decision involved three different suits including *Dang v. Avondale Shipyards, Inc.*, 83-3580. Dang was injured while constructing a vessel at the Avondale Shipyard and he had brought his suit against both Avondale and El Paso Columbia Tanker Co., who was the purchaser of the vessel. The following is an excerpt from the *Hall* decision concerning Dang's claim against Avondale and the contract provision providing for title to the vessel:

> The district court dismissed the two defendants for different reasons. It dismissed Avondale on the grounds that, according to the construction contract, Avondale was not a vessel owner and so could not be held liable for vessel-owner negligence in a tort action authorized by section 905(b). It dismissed El Paso on the grounds that, at the time of Dang's accident, the M/V El Paso Columbia was not a vessel within the terms of section 905(b), since at that time the tanker was only 70% complete, had no assigned crew, and had never had any sea trials.
>
> Reversal of El Paso's dismissal is required by *Lundy*, *see* I above. Turning then to the dismissal of Avondale, we find that the district court erred in concluding that no material facts are in dispute regarding Avondale's alleged ownership interest in the M/V El Paso Columbia. In our view, the relevant

> provision in the contract is ambiguous and is subject to factual parol evidence as to its intended meaning with regard to ownership of the vessel. A potential meaning susceptive of parol explanation is that, in fact, El Paso had only a security interest in the vessel and that its paper evidence to title was merely a disguised security interest to be held until the "completed contract work" was "delivered," not until such time would title be vested in El Paso. Another potential meaning of the contract is that the two parties were co-owners.
>
> Therefore, on the face of the summary judgment showing, we are unable to conclude on the naked basis of the contract provision that no material issue of fact as to ownership is disputed, so as to permit summary judgment.
>
> For the purposes of this appeal, then, under the showing made in support of the motion for summary judgment, both Avondale and El Paso may be either an owner or a co-owner of the M/V El Paso Columbia, a vessel on navigable waters within the meaning of *Lundy*, and thus subject to 905(b) liability. *See* I. *supra*. We reverse the summary judgments in favor of these two defendants. . .

There are no additional facts that can be offered by either Litton or Petitioner to further clarify the meaning of the terms of the contract. The intent of the contract clearly makes Litton either an owner or a co-owner of this vessel from the beginning of the construction of the vessel until actual delivery to the purchasers when all payments have been made and the risk of loss passes as stated above.

4. THERE ARE SUFFICIENT FACTS TO SUPPORT PETITIONER'S CLAIM THAT THE DEFENDANTS LITTON, HUTHNANCE, KEYES AND TRANSWORLD WERE NEGLIGENT AS A VESSEL UNDER 33 U.S.C. SECTION 905(b).

There exists a genuine factual issue as to whether the Defendants Litton, Huthnance, Keyes and Transworld were negligent as a vessel under 33 U.S.C. § 905(b) as defined in 33 U.S.C. § 902(21).

It is admitted by all parties and the witnesses deposed that Petitioner and the Defendants' supervisors and employees at the time of the accident were working overtime on Saturday night between 9:00 - 10:00 p.m. because Litton was behind on its production schedules. Petitioner and his crew were being rushed to complete the work and during the process a part of the vessel fell on Petitioner Terry May.

Litton, Huthnance, Keyes and Transworld all deny that they were guilty of any negligence that caused the part of the vessel to fall onto and injure Petitioner. Petitioner has no quarrel with their position that they were not negligent in any manner in providing the shipbuilding services to the vessel, and, in fact, Petitioner will agree with Defendants on this point; however, Petitioner does have evidence to be presented to a jury that Petitioner was injured as a result of Defendants' negligence as vessel owner that should be attributed to the vessel.

In *Pichoff v. Bisso Towboat Co., Inc.*, 748 F.2d 300 (5th Cir. 1984), the Defendant contended that it was negligent as a vessel repairer and not as an owner. In that case Pichoff was instructed by his supervisors to conduct his work in a hurried manner since his employer who was also the owner of the vessel would lose money if the boat was not provided

to a customer the next day. The court found that the supervisors' orders and instructions were guided by a corporate concern to avoid losing money. The court made its finding in the following manner:

> When Lange told Pichoff to hurry up, he was fulfilling a duty as an agent of the shipowner. Slattern had made it clear to him that Bisso was about to lose money if it could not provide a boat to a customer the next day; Lange's order to Pichoff was guided by this corporate concern. It is not uncommon for vessel owners to be found negligent for insisting, as Lange did, that workers perform their jobs hurriedly despite unsafe working conditions. *See, e.g., Lubrano v. Royal Netherlands Steamship Co.*, 572 F.2d 364 (2nd Cir. 1978) (ship's crew negligent for ordering longshoremen to keep working despite slippery decks); *Offshore Logistics Services, Inc. v. Mutual Marine Office, Inc.*, 462 F.Supp. 485 (E.D. La. 1978) (owner negligent in ordering use of small, fast boat rather than large, slow one despite heavy seas).
>
> The line between owner and repairer is dull and elusive, at best. Fortunately, the Congress has for future cases ended this sometimes pretentious distinction. Aided in our task in intuition and common sense, we conclude here that the district court's call was rational and defensible. Lange's negligence was at least partly in his capacity as representative of the vessel owner, rather than his capacity as repair supervisor. The judgment against Bisso is thus permissible under § 905(b).

Obviously, since a part of the vessel fell on Petitioner, unsafe working conditions existed in the area in which Petitioner was working. The fact that the Petitioner and his crew members were instructed by their supervisors to work overtime at night because they were behind on production schedules and were being hurried was a contributing factor and a proximate cause of the accident. As shown by the depositions and affidavit, the area was poorly lighted, the part of the vessel that fell on Petitioner was either not tacked down or was improperly tacked. Defendants were using an injured employee to operate the crane and Petitioner was forced to work with a make-shift crew created to work overtime because Litton was behind on its production schedules.

The falling of a part of the vessel must have been caused by the fault or negligence of:

(1) Petitioner; or

(2) an "Act of God"; or

(3) the vessel, its owner, etc.; and/or

(4) the shipbuilder.

Defendants do not claim or contend that it was caused by either (1) or (2) and whether it was caused by (3), the vessel, etc., or (4), the shipbuilder or both, is a question of fact to be decided by the jury.

CONCLUSION

For the reasons stated above Petitioner respectfully requests that this Court should grant a writ of certiorari to review the decision of the Court of Appeals. When all the issues outlined above which arise from the Fifth Circuit's decision are considered, it is clear that this petition provides the Court with a unique opportunity. The serious controversy and conflicts in the law of employer immunity from suit under the LHWCA which so vex the lower courts and Congress alike can be resolved by this court in this case in a single opinion.

Respectfully submitted,

TERRY MAY, PETITIONER

By Lampton O Williams pmc
LAMPTON O. WILLIAMS

By E. Bragg Williams pmc
E. BRAGG WILLIAMS, III

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L. O'NEAL WILLIAMS, JR.

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Attorneys for Petitioner

CERTIFICATE

I, E. Bragg Williams, III, certify that on or before the 10th day of July, 1986, I mailed, postage prepaid, forty (40) copies of the Petition for Writ of Certiorari to the United States Ccurt of Appeals for the Fifth Circuit to the Clerk of the Supreme Court of the United States, One First Street N.E., Washington, D.C. 20543, and mailed three (3) copies, postage prepaid, to Karl Wiesenburg, Esq., Firm of Wiesenburg & Reed, P. O. Box 1428, Pascagoula, MS 39567, Attorney for the Defendants.

E. Bragg Williams III

E. BRAGG WILLIAMS, III

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

TERRY MAY,

Plaintiff

versus

TRANSWORLD DRILLING COMPANY, LITTON SYSTEMS, INC., AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, KEYES OFFSHORE, INC., and HUTHNANCE DRILLING COMPANY,

Defendants

CIVIL ACTION NO. S82-0307 (N)

FILED in the
Southern District of Mississippi
on February 27, 1985
Clarence A. Pierce, Clerk
By _____ Deputy

ORDER AND REASONS

Plaintiff has filed a Motion for Partial Summary Judgment alleging that there is no genuine issue of any material fact concerning the following legal propositions: (a) that plaintiff was working on a vessel within the meaning of 33 USC § 905(b) since he was working on a partially constructed vessel and was covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA); and (b) that Litton is an entity subject to suit under 33 USC § 905(b) under the contracts applicable to the construction of the vessels for Huthnance, Keyes and Transworld.

Plaintiff cites *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (CA 5-1980), *Hall v. Hvibe Hall No. 3*, 746 F.2d 294 (CA 5-1984), and *Trussel v. Litton Systems, Inc.*, _____ F.2d _____ (CA 5, No. 84-4405, Dec. 3, 1984) in support of his contention that he was working on a vessel within the meaning of 33 USC § 905(b). *Lundy* held that an incomplete ship was a vessel for purposes of § 905(b). *Hall* and *Trussel*, relying on *Lundy*, found that a vessel for purposes of the LHWCA includes any partially constructed vessel on which individuals covered under the Act are working. In finding that an incomplete ship was a vessel, *Lundy* referred to the definitional section of the LHWCA which provides that: "the term 'vessel' means any vessel upon which or *in connection with which* a person entitled to benefits under this chapter suffers injury or death arising out of or in the course of employment . . ." 33 UCSA § 902(21) (emphasis added). After noting that shipbuilders were employees under the Act, the *Lundy* court noted "we have previously held that shipbuilders who do the initial work to construct a vessel for launching are just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship." *Id.* at 592. Plaintiff apparently is arguing that because he suffered injury *in connection with* the construction of a vessel while performing duties in the course of his employment, he is entitled to maintain a 905(b) action.

Plaintiff was injured while working on land within the shipyard in a work area where fabricated steel for the vessels being constructed for Transworld, Keyes, Huthnance and other companies was being stored.[1] (See Stip. No. 12). What plaintiff fails to distinguish as far as the *Lundy* and *Hall*

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1. The parties to this lawsuit determined that there were threshhold issues of law that should be determined by the Court prior to trial, and agreed to a bifurcation of this cause. The parties agreed to argue these

decisions are concerned is that the injuries therein occurred on incomplete vessels floating on navigable waters.

While it is true that *Trussel* involved an injury on board a vessel that was under construction on a building platform in a building way within the shipyard, the decision in *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (CA 5-1984), rendered after the *Trussel* decision, held that the district court had no jurisdiction to hear Christoff's lawsuit stemming from his work on an incomplete vessel not in the water.[2] Plaintiff

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1. (Continued)

issues through briefs and a stipulation of facts (Stip.) submitted to the Court. Accordingly, an Order of Bifurcation was signed by this Court on January 25, 1985. The legal issues to be decided were the same as those raised by the parties in their respective Motions for Summary Judgment. Thus, the Court took into consideration all evidence submitted for its review, including the stipulation of facts, in deciding the issues of law in question.

2. It should be noted that a corrected opinion was issued in *Trussel* adding a footnote which stated in part as follows: "We are in complete agreement with Christoff . . . that a suit under 905(b) for injury to a shipbuilder on a partially completed vessel located on land does not involve the court's admiralty and maritime jurisdiction." The court found it had jurisdiction to hear the case based on diversity, but threw out plaintiff's 905(b) claim on the grounds that Litton was not the owner or owner *pro hoc vice* of the vessel, and because the plaintiff's injuries were caused by fellow shipbuilders. [§ 905(b) prohibits an action by a shipbuilder if the injury was caused by the negligence of persons engaged in providing shipbuilding services to the vessel.] In the present case, the plaintiff is attempting to bring a 905(b) action against Litton in its capacity as an *owner* of the vessel and not in its capacity as a shipbuilder. *See Allied Towing Corp. v. Tatem*, 580 F.2d 702 (CA 4-1978), and *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (CA 2-1979). Apparently, the fact that the plaintiff's injury occurred on land and not on water was never raised as an issue by the defendants in *Trussel*.

argues that *Christoff* simply dealt with whether or not the federal court had jurisdiction to hear a 905(b) claim where the injury occurred on land. He states that the *Christoff* court held the 905(b) action was not within the admiralty jurisdiction of the federal courts and ordered the case dismissed for want of jurisdiction. He contends that *Christoff* has no application to the case at bar because Litton has stipulated that the court has diversity jurisdiction (See Stip. No. 6).

A close reading of *Christoff*, and the cases on which it relies, leads us to conclude that the plaintiff is incorrect in stating that *Christoff* simply dealt with whether or not the court had jurisdiction to hear a 905(b) claim. *Christoff* relied on *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (CA 5-1976) which held that § 905(b) neither extended the boundaries of traditional admiralty nor converted ordinary tort claims against vessels into federal questions independent of admiralty. *Christoff* noted that the *Parker* court found no jurisdiction over a § 905(b) action for an accident that, although allegedly caused by a vessel's negligence, occurred on land.

> "Of particular importance in the present case is the fact that § 905(b) eliminates only an injured worker's right to bring actions against third parties based on unseaworthiness, and preserves his right under prior law to recover for third party negligence." *Parker*, 537 F.2d at 117.

Parker stated that the legislative history of 905(b) leaves little doubt that Congress did not intend the section to create a new or broader cause of action in admiralty. *Id.*, at 117.

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness, non-delegable duty, or the like.'
>
> Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially enacted doctrine of unseaworthiness."
> 1972 U.S.Code Cong. & Admin. News at p. 4703 (as quoted in *Parker*, 537 F.2d at 117).

Parker further stated that § 905(b) merely preserves an injured worker's right to recover damages from third parties in accordance with non-statutory negligence principles. *Id.*, at 118. "With respect to third party actions for negligence, the reasonable inference is that the boundaries of maritime jurisdiction as defined under prior law (*e.g. Victory Carriers*) were neither expanded nor constricted by passage of the 1972 amendments, but simply retained." *Id.*, at 117.

As noted earlier, plaintiff's motion calls for a finding that plaintiff was working on a vessel "within the meaning of 33 USC § 905(b)." Since plaintiff was injured on land, he is

unable to pursue a negligence claim under 905(b).[3] Therefore, it is unnecessary for this Court to determine whether or not plaintiff was working on a vessel within the meaning of 905(b).

Plaintiff's second contention is that Litton is an entity subject to suit under 33 USC § 905(b). He asserts that the intent of the contracts clearly make Litton either an owner or a co-owner of the vessels. Again, since plaintiff is unable to bring a negligence claim based on 905(b) against Litton, it is unnecessary for us to address this issue.

For the reasons set forth above, it is ORDERED, ADJUDGED and DECREED that plaintiff's motion for partial summary judgment be and hereby is DENIED, this 27th day of February, 1985.

/s/ Lansing L. Mitchell
U.S. SENIOR DISTRICT COURT JUDGE

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3. Note that plaintiff was injured on February 14, 1981, when a piece of fabricated steel for one of the vessels under construction fell on him. None of the vessels under construction had been launched prior to the date of the accident. (See Stip. Nos. 13 and 18).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

TERRY MAY,

Plaintiff

versus

TRANSWORLD DRILLING COMPANY, LITTON SYSTEMS, INC., AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, KEYES OFFSHORE, INC., and HUTHNANCE DRILLING COMPANY,

Defendants

CIVIL ACTION NO. S82-0307(N)

FILED in the
Southern District of Mississippi
on February 27, 1985
Clarence A. Pierce, Clerk
By _____ Deputy

ORDER AND REASONS

The defendant Litton Systems, Inc., has filed a Motion for Summary Judgment as to all claims asserted in plaintiff's Amended Complaint.[1]

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1. The parties to this lawsuit determined that there were threshhold issues of law that should be determined by the Court prior to trial and agreed to a bifurcation of this cause. The parties agreed to argue these issues through briefs and a stipulation of facts (Stip.) submitted to the Court. Accordingly, an Order of Bifurcation was signed by this Court on January 25, 1985. The legal issues to be decided were the same as those raised by the parties in their respective Motions for Summary

Plaintiff has dismissed American Mutual Liability Insurance Company from his suit. He has also dropped his claims against Litton under the general maritime law and the Jones Act, 46 USC § 688. His remaining causes of action consist of third party actions under 33 USC § 905(b) against Litton, Transworld, Keyes, and Huthnance, third party actions for negligence under 33 USC § 933 against Transworld, Keyes and Huthnance, negligence under the doctrine of *res ipsa loquitur*, and intentional tort. Although counsel for Litton named only Litton in his motion for summary judgment, he indicated at a conference with the Judge that the motion for summary judgment was on behalf of all defendants.

Defense counsel argues in brief that plaintiff's 905(b) claims against Litton, Transworld, Huthnance, and Keyes should be dismissed for the reasons set forth in *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (CA 5-1984). *Christoff* held that the district court had no jurisdiction to hear Christoff's lawsuit stemming from his work on an incomplete vessel not in the water.

33 USC § 905(b) provides in pertinent part:

> "In the event of injury to a person covered under this Act caused by negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . ."

The term "vessel" includes the vessel's owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master,

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1. (Continued)

Judgment. Thus, the Court took into consideration all evidence submitted for its review, including the stipulation of facts, in deciding the issues of law in question.

officer, or crew member. 33 USC § 902(21). Plaintiff argues that *Christoff* simply dealt with whether or not the federal court had jurisdiction to hear a 905(b) claim where the injury occurred on land. He states that the *Christoff* court held a 905(b) action was not within the admiralty jurisdiction of the federal courts and ordered the case dismissed for want of jurisdiction. It is plaintiff's contention that *Christoff* has no application to the case at bar because Litton has stipulated that the court has diversity jurisdiction (see Stipulation No. 6). In other words, plaintiff maintains that he still has a 905(b) cause of action, which the federal court can hear in spite of the fact that the injury occurred on land, because of the existence of diversity jurisdiction.

A close reading of *Christoff*, and the cases on which it relies, leads us to conclude that the plaintiff is incorrect in stating that *Christoff* simply dealt with whether or not the federal court has jurisdiction to hear the case. *Christoff* relied on *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d (CA 5-1976) in which it was held that § 905(b) neither extended the boundaries of traditional admiralty nor converted ordinary tort claims against vessels into federal questions independent of admiralty. It was noted that the *Parker* court found no jurisdiction over a § 905(b) action for an accident that, although allegedly caused by a vessel's negligence, occurred on land.

> "Of particular importance in the present case is the fact that § 905(b) eliminates only an injured worker's right to bring actions against third parties based on unseaworthiness, and preserves his right under prior law to recover for third party negligence."
> *Parker*, 537 F.2d at 117.

Parker stated that the legislative history of 905(b) leaves little doubt that Congress did not intend the section to create a new or broader cause of action in admiralty. *Id.* at 117.

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness, non-delegable duty, or the like.'
>
> Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially enacted doctrine of unseaworthiness." 1972 U.S.Code Cong. & Admin. News at p. 4703 (as quoted in *Parker*, 537 F.2d at 117).

Parker further stated that § 905(b) merely preserves an injured worker's right to recover damages from third parties in accordance with non-statutory negligence principles. *Id.* at 118. "With respect to third party actions for negligence, the reasonable inference is that the boundaries of maritime jurisdiction as defined under prior law (*e.g. Victory Carriers*) were neither expanded nor constricted by passage of the 1972 amendments, but simply retained." *Id.* at 117.

Victory Carriers, Inc. v. Law, 404 US 200, 92 S.Ct. 418 (1971) found that a longshoreman injured on a pier while driving a forklift truck which was moving cargo that would

ultimately be loaded aboard a ship was not entitled to the application of maritime law. The Court states "as the law now stands, state law has traditionally governed accidents like this one. To afford respondant a maritime cause of action would thus intrude on area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or preempted, and would furnish opportunity for circumventing state workman's compensation statutes." *Id.*, 404 U.S. 212, 92 S.Ct. at 425.

In 1972 the LHWCA was amended to provide compensation for an injury occurring not only upon navigable waters of the United States, but upon "any adjoining pier, wharf, dry dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 USC § 903. "[The longshoreman's] right to recover from the shipowner for negligence was *preserved* in 905(b) . . ." *Scindia Steam Nav. Co. Ltd., v. Do Los Santos*, 451 U.S. 156, 101 S.Ct. 1615 (1981) (emphasis added). Thus, although an injured party's right to receive compensation was expanded to cover injuries occurring on property adjoining navigable waters, as stated earlier, 905(b) did not extend the boundaries of traditional admiralty nor convert ordinary tort claims against vessels into federal questions independent of admiralty. *Parker, supra* at 118.

Defendant next contends that plaintiff's state claims are barred due to the "exclusivity" of the LHWCA, section 905(a) of which provides in pertinent part:

> "The liability of an employer prescribed in section 4 [33 USC § 904] shall be exclusive and in place of all other liability of such employer to the employee . . ."
> 33 USC 905(a).

With regard to plaintiff's state claims against Litton, he is barred from asserting any negligence claim, including a *res ipsa loquitur* claim, due to the exclusiveness of the employer's liability under the Act. The only state claim against Litton that would not automatically be barred by section 905(a) is an "intentional tort" claim, if we find a sufficient factual showing to support a possibility of intentional tort liability. Plaintiff must show that Litton "actively desired or was substantially certain that physical harm would result to its employees by the safety standards practiced" at the Litton construction facility. *See Jenkins v. McDermott, Inc.*, 734 F.2d 229 (CA 5-1984).

Reviewing the depositions, pleadings, and plaintiff's affidavit in the light most favorable to the plaintiff, we cannot say that there is no genuine issue as to acts and/or omissions on the part of Litton that would satisfy the prerequisites for intentional tort liability. In other words, there exists a genuine issue of material fact as to whether or not Litton could be held liable for an intentional tort, and we therefore deny Litton's motion for summary judgment as to that issue.

Conversely, we see nothing in the evidence presented to us to indicate that there is any possibility that the other defendants, i.e. Transworld, Huthnance or Keyes, could be found liable for intentional tort, and therefore grant summary judgment in their favor on this issue.

Plaintiff has also asserted a *res ipsa loquitur* negligence claim against Transworld, Huthnance and Keyes.

In Mississippi the court has defined the doctrine in the following terms:

> "[R]es ipsa loquitur is a rule of circumstantial evidence from which the jury is entitled to draw an inference of the defendant's negligence." *Johnson v. Foster*, 202 So.2d 520, at 524 (Miss. 1967).

And the court has listed four elements which must exist for the doctrine to be applied:

> "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> (3) it must not be due to any voluntary action on the part of the plaintiff;
>
> (4) plaintiff must not be in a position to show the particular circumstances which caused the offending agency or instrumentality to operate to his injury." *Morgan v. Mississippi Power Company, Inc.*, 298 So.2d 698 (Miss. 1974)

Plaintiff's claim against Transworld, Huthnance and Keyes is defeated by the second element; the accident clearly was not caused by an agency or instrumentality within the exclusive control of any of those three defendants. The accident occurred on Litton property where only Litton employees were present at the time. The "instrumentality" causing the accident was within the exclusive control of Litton. Therefore, we must grant summary judgment in favor of defendants Transworld, Huthnance and Keyes on the

res ipsa loquitur issue.

Plaintiff's remaining claim against Transworld, Huthnance and Keyes is for negligence under Mississippi law. He alleges that the three defendants were

> "... negligent in breaking [their] non-delegable duty to use reasonable care in preventing injury from the negligence of Litton ... engaged in an inherently and intrinsically dangerous activity ... [and] in failing to exercise reasonable care to inspect and properly superintend the premises, procedures and materials involved in constructing their vessels."
> (Second Amended Complaint, Paragraph XV)

The contracts between Litton and Transworld expressly provide that Litton, as independent contractor, "shall be responsible for the manner and method of performing the work and the direction of all persons engaged in or on the work ..." (See e.g. Exhibit A(1) para. 16, p. 21). Further, the contracts state that the contractor (Litton) shall in performing the work "furnish all labor, supervision, materials, supplies, tools and equipment necessary or required for completion of the work ..." (See e.g. Exhibit A(1), para. 2, p. 3.)

The contracts between Litton and Keyes and Huthnance, while not expressly setting forth the above provisions, make it clear that Litton is responsible for the supervision of the labor and the work in general.

Nowhere in any of the contracts is there any provision which shifts all or part of the responsibility for the safe performance of the work from Litton to the other three defendants. Nor can plaintiff cite any rule of law that would

place any responsibility on the other three defendants for the safe performance of the shipbuilder's work under the circumstances of this case. In other words, there is no evidence that Transworld, Keyes or Huthnance breached any legal duty to the plaintiff. The general rule is that the employer of an independent contractor has no vicarious liability for the torts of the independent contractor or for the torts of the independent contractor's employees in the performance of the contract. *Mississippi Power Company v. Mrs. Sue Brooks*, 309 So.2d 863 (Miss., 1975).

Plaintiff admits in brief that Transworld, Huthnance and Keyes were not negligent in any manner in providing the shipbuilding services to the vessel. However, he argues that the plaintiff was injured as a result of the defendants' negligence as vessel owners that should be attributed to the vessel.

This argument is really the same as the 905(b) claim against the defendants discussed earlier, which we found could not be maintained under the circumstances of this case. In short, plaintiff has no 905(b) cause of action in a case where the injury occurred on land, regardless of whether or not the injury occurred on or in connection with a complete or incomplete vessel.

In summary, for the reasons set forth above, we grant defendants' motion for summary judgment as to all defendants on the 905(b) claim. We also grant the motion in favor of Transworld, Huthnance and Keyes as to all state claims brought against them. We deny defendant Litton's motion for summary judgment as to plaintiff's intentional tort claim.

It is ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be granted dismissing all claims against defendants except for plaintiff's intentional tort claim against Litton, this 27th day of February, 1985.

/s/ Lansing L. Mitchell
U.S. SENIOR DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

TERRY MAY,

Plaintiff

versus

TRANSWORLD DRILLING COMPANY, LITTON SYSTEMS, INC., AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, KEYES OFFSHORE, INC., and HUTHNANCE DRILLING COMPANY,

Defendants

CIVIL ACTION NO. S82-0307(N)

FILED in the
Southern District of Mississippi
on February 27, 1985
Clarence A. Pierce, Clerk
By _____ Deputy

ORDER

Defendant Keyes Offshore, Inc.'s Motion for Summary Judgment is hereby granted for the reasons set forth in this Court's Order and Reasons of February 27, 1985, in response to defendant Litton Systems, Inc.'s Motion for Summary Judgment.

/s/ Lansing L. Mitchell
U.S. SENIOR DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

TERRY MAY,

Plaintiff

versus

TRANSWORLD DRILLING COMPANY, LITTON SYSTEMS, INC., AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, KEYES OFFSHORE, INC., and HUTHNANCE DRILLING COMPANY,

Defendants

CIVIL ACTION NO. S82-0307(N)

FILED in the
Southern District of Mississippi
on February 27, 1985
Clarence A. Pierce, Clerk
By _____ Deputy

ORDER

Defendant Transworld Drilling Company's Motion for Summary Judgment is hereby granted for the reasons set forth in this Court's Order and Reasons of February 27, 1985, in response to defendant Litton Systems, Inc.'s Motion for Summary Judgment.

/s/ Lansing L. Mitchell
U.S. SENIOR DISTRICT COURT JUDGE

APPENDIX B

A-19

Terry MAY, Plaintiff-Appellant,

v.

TRANSWORLD DRILLING CO., et al.,
Defendants-Appellees.

No. 85-4325.

United States Court of Appeals,
Fifth Circuit.

April 11, 1986.

Shipyard worker injured on dry land asserted third-party tort claim against his employer, as owner of vessel, for negligence of his superiors, or, if employer was not owner, then against companies for which employer was building vessel. The United States District Court for the Southern District of Mississippi, Lansing L. Mitchell, J., dismissed the suit by summary judgment on the basis that the injury occurred on land and did not constitute a negligence claim cognizable under Longshore and Harbor Workers' Compensation Act. Worker appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) although trial court did not have admiralty jurisdiction, since injury occurred on dry land, it had jurisdiction because of diversity of citizenship of parties, and (2) section of Longshore and Harbor Workers' Compensation Act governing actions against vessel by person injured by vessel's negligence, permits only assertion of claim for maritime tort; only if claimant first alleges facts comprising maritime tort, does Court of Appeals need to inquire whether he has established subsidiary elements of cause of action against owner of vessel; that is, involvement of "vessel," negligence of vessel, and other subsidiary issues, such as identity of vessel owner; and (3) claim failed to meet test for

maritime tort.

Affirmed.

1. **Judgment KEY 654**

Judgment dismissing claim for want of jurisdiction is not res judicata on the merits, but judgment of dismissal for failure to state a claim is a judgment on the merits, with preclusive effect.

2. **Admiralty KEY 22**

Not even first requirement of admiralty jurisdiction was met, where worker's injury occurred on land in shipyard.

3. **Federal Courts KEY 284**

Trial court had jurisdiction over shipyard worker's action to recover in tort under Longshore and Harbor Worker's Compensation Act [Longshore and Harbor Workers' Compensation Act, § § 1 et seq., 5(b), 33 U.S.C.A. § § 901 et seq., 905(b)], because of diversity of citizenship of parties, whatever the nature of the cause of action.

4. **Shipping KEY 84(1)**

Longshore and Harbor Workers' Compensation Act § 5(b) [Longshore and Harbor Workers' Compensation Act § 5(b), 33 U.S.C.A. § 905(b)], governing actions against vessel by person injured by vessel's negligence, permits only assertion of claim for maritime tort; only if claimant first alleges facts comprising maritime tort, does Court of Appeals need to inquire whether he has established subsidiary elements of § 905(b) cause of action; that is, involvement of "vessel," negligence of vessel, and other subsidiary issues, such as

identity of vessel owner.

5. **Admiralty KEY 50**

Longshore and Harbor Workers' Compensation Act § 5(b) [Longshore and Harbor Workers' Compensation Act § 5(b), 33 U.S.C.A. § 905(b)], governing who may bring action against vessel as third party due to injuries caused by negligence of vessel, curtails rather than expands availability of third-party actions in admiralty; it preserves injured worker's preexisting right, under general maritime law, to recover for third-party negligence, but eliminates his right to bring actions against third parties based on the unseaworthiness.

6. **Admiralty KEY 26**

Test to determine existence of cause of action in maritime court is identical with that applied to determine jurisdiction in admiralty.

7. **Admiralty KEY 26**

Worker's claim failed to meet test for admiralty tort, just as it failed to meet test to establish admiralty jurisdiction, where injury did not occur on navigable waters. Longshore and Harbor Workers' Compensation Act § 5(b), 33 U.S.C.A. § 905(b).

Lampton O. Williams, Joe H. Montgomery, Williams, Williams & Montgomery, Poplarville, Miss., for plaintiff-appellant.

Karl Wiesenburg, Wiesenburg & Reed, William F. Jordan, Pascagoula, Miss., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, ALVIN B. RUBIN, and E. GRADY JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The issue to be resolved in this case is whether a shipyard worker injured on dry land can recover under the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), which accords a tort remedy to persons sustaining injuries "caused by the negligence of a vessel."[1] We hold that this statutory provision does not create a new federal tort but merely recognizes the continued, albeit narrowed, existence

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1. 33 U.S.C. § 905(b). At the time of May's accident, § 905(b) read, in its entirety:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. *If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel.* The liability of the vessel under this subsection shall not be based upon the warranty

of an historic maritime tort remedy. Accordingly, we find that a shipyard worker who was injured while working in a storage area moving fabricated steel that was to be installed as part of a vessel did not sustain an injury cognizable under that statute. Injury on navigable waters is a sine qua non of the maritime tort. We therefore affirm the summary judgment granted the defendants by the district court.

I.

Litton Systems, Inc. was building a number of drilling vessels under separate contracts with Transworld Drilling Company, Keyes Offshore, Inc., and Huthnance Drilling

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1. (Continued)

> of seaworthiness or breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under the chapter. (Emphasis added.)

In 1984, this section was amended and the following provision was substituted for the italicized sentence above:

> If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

The 1984 amendment to § 905(b) is applicable only to injuries occurring after September 28, 1984 and hence does not itself preclude May's claim against Litton, his employer, as the vessel owner. LHWCA Amendments of 1984, Pub. I. No. 98—426, § 5(b), 98 Stat. 1639, 1641.

Company, at its shipyard in Pascagoula, Mississippi. On the day the injury occurred, work on the vessels had reached various stages of completeness, ranging from 72.1 percent complete to 2.5 percent complete. Terry May was employed by Litton as a rigger. He asserts that he was assigned to work overtime with a makeshift crew because Litton was lagging behind its production schedule. As instructed by his supervisor, May was working with a crane moving large pieces of fabricated steel into position for installation on the legs of one of the incomplete drilling structures. A piece of steel that was part of an assembly intended for one of the vessels-to-be fell on him, injuring him severely. The steel piece had been standing vertically, had not been braced or tacked, and neither May nor any other Litton employee had been working with this assembly. The particular vessel under construction for which the assembly was intended has never been identified.

May alleges that, because of a previous shipyard accident, Litton had adopted a special safety regulation that required all freestanding vessel parts to be properly braced or tacked. May contends that Litton's supervisors were urging Litton's employees to work in a hurried manner, with insufficient lighting, and with a makeshift crew. As a result of the haste, according to May, the safety rule was being violated.

May was covered by the Longshore and Harbor Worker's Compensation Act and is receiving compensation benefits. But he contends that he also has a third-party tort claim against Litton, his employer, as the owner of the inchoate vessel, for the negligence of Litton's supervisors as the negligence of a vessel,[2] or, if Litton is not the owner, then against the companies for which Litton was building the vessels, as

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2. *See, e.g., Pichoff v. Bisso Towboat Co.*, 748 F.2d 300, 302-03 (5th Cir. 1984).

the vessel owners.[3]

May invoked diversity jurisdiction, and the parties are indeed diverse in citizenship. In this appeal, however, Litton argues that the district court "correctly held that it did not have federal subject matter jurisdiction of the plaintiff's 33 U.S.C. 905(b) claim." The district court, however, did not so hold. It granted Litton's motion for summary judgment on the basis that May's injury occurred on land and, therefore, did not constitute a negligence claim cognizable under § 905(b).

II.

[1] Whether the district court had jurisdiction to consider May's claim must be distinguished from whether May's allegations state a cause of action under § 905(b). A judgment dismissing a claim for want of jurisdiction is not res judicata on the merits, but a judgment of dismissal for failure to state a claim is a judgment on the merits, with preclusive effect. In *Parker v. South Louisiana Contractors, Inc.*,[4] we discussed federal jurisdiction in cases in which an injury occurs on land and a § 905(b) claim is asserted based solely on admiralty jurisdiction.[5] In accordance with consistent prior authority, we held that admiralty tort jurisdiction is dependent on the locality of the tortious act,[6] and that § 905(b) "neither

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3. *See, e.g., Hall v. Hvide Hull No. 3*, 746 F.2d 294, 304-05 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 69, 88 L.Ed.2d 56 (1985).

4. 537 F.2d 113 (5th Cir. 1976), *cert. denied*, 430 U.S. 906, 97 S.Ct. 1175, 51 L.Ed.2d 582 (1977).

5. *See* 28 U.S.C. § 1333.

6. *Parker*, 537 F.2d at 115 & n. 3.

expanded nor constricted" the boundaries of maritime jurisdiction,[7] nor did it create a new federal cause of action cognizable under federal-question jurisdiction.[8]

[2] *Parker* recognized that, even if a tort occurs on navigable waters, a maritime nexus is also a prerequisite to admiralty jurisdiction, as the Supreme Court held in *Executive Jet Aviation, Inc. v. City of Cleveland*.[9] Because May's injury occurred on land in a shipyard, not even the first requirement of admiralty jurisdiction was met here.

[3] The district court, therefore, did not have jurisdiction in admiralty. It did, however, have jurisdiction of the controversy because of the diversity of citizenship of the parties,[10] whatever the nature of the cause of action.[11] The issue, then, is whether, under the facts shown by the materials filed in opposition to the summary judgment motion, construed most favorably to May, he may recover under § 905(b).

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7. *Id.* at 117.

8. *Id.* at 118; 28 U.S.C. § 1337.

9. 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454, 467 (1972).

10. 28 U.S.C. § 1332.

11. *See Rubin & King, New Cargo From Old Ports: Recent Significant Maritime Personal Injury Cases*, 8 Mar. Law. 1, 10 (1983).

III.

[4] Our opinions interpreting the applicability of § 905 (b) to injuries that are allegedly caused by the negligence of a vessel under construction, whether on water[12] or on dry land,[13] contain statements that are not fully consistent.[14] The inconsistency has arisen, perhaps in part, because we have not always distinguished jurisdiction from the sufficiency of the plaintiff's evidence to establish a claim under § 905(b). Following prior Fifth Circuit precedent and the recent First Circuit decision in *Drake v. Raymark Industries, Inc.*,[15] we here explicitly hold that § 905(b) permits only the assertion of a claim for a maritime tort. Only if a claimant first alleges facts comprising a maritime tort do we need inquire whether he has established the specific elements of a § 905(b) cause of action: (1) the involvement of a "vessel", [16] (2) the

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12. *See, e.g., Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 69, 88 L.Ed.2d 56 (1985); *Lundy v. Litton Sys., Inc.*, 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981).

13. *See, e.g., Christoff v. Bergeron Indus., Inc.*, 748 F.2d 297 (5th Cir. 1984); *Trussell v. Litton Sys., Inc.*, 753 F.2d 366 (5th Cir. 1984).

14. *See Drake v. Raymark Indus., Inc.*, 772 F.2d 1007, 1014, 1016-18 (1st Cir. 1985).

15. 772 F.2d 1007 (1st Cir. 1985).

16. *See, e.g., Trussell*, 753 F.2d at 367; *Hall*, 746 F.2d at 298-99; *Lundy*, 624 F.2d at 592; *see also McCarthy v. The Bark Peking*, 716 F.2d 130, 133-34 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984).

"negligence of the vessel,"[17] and (3) other subsidiary issues, such as the identity of the vessel owner.[18]

[5] "Congress did not," we said in *Parker*, "intend section 905(b) to create a new or broader cause of action in admiralty."[19] "Taken as a whole," we added, its primary purpose was "to curtail rather than expand the availability of third party actions in admiralty."[20] It preserves an injured worker's pre-existing right, under general maritime law, to recover for third-party negligence, but eliminated his right to bring actions against third parties based on unseaworthiness.[21]

We affirmed *Parker* in *Christoff v. Bergeron Industries, Inc.*[22] The Fourth Circuit reached the same conclusion in *Holland v. Sea-Land Service*,[23] and the Eleventh Circuit followed suit in *Harville v. Johns-Manville Products Corp.*[24] The First Circuit has recently analyzed and agreed with these

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17. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); *Futo v. Lykes Bros. S.S. Co.*, 742 F.2d 209 (5th Cir. 1984).

18. *See, e.g., Hall*, 746 F.2d at 304-05.

19. 537 F.2d at 117.

20. *Id.*

21. *Id.*; *see generally Drake*, 772 F.2d at 1013-16.

22. 748 F.2d 297 (5th Cir. 1984).

23. 655 F.2d 556 (4th Cir. 1981), *cert. denied*, 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed.2d 459 (1982).

24. 731 F.2d 775 (11th Cir. 1984).

decisions in *Drake v. Raymark Industries*.[25] *Drake* held that "§ 905(b) is limited to maritime torts," defining these as "torts cognizable in admiralty (regardless of the actual basis of jurisdiction, such as diversity)."[26]

[6] The test to determine the existence of a cause of action in maritime tort is identical with that applied to determine jurisdiction in admiralty.[27] The Supreme Court, in *Foremost Insurance Company v. Richardson*,[28] held that, as indicated in *Executive Jet*,[29] it is requisite to proof of a maritime tort that there be an injury on navigable waters (the traditional "locality" test) and, in addition, that the alleged wrong bear a significant relationship to traditional maritime activity.

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25. 772 F.2d 1007 (1st Cir. 1985).

26. *Id.* at 1012; *see also Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.), *cert. denied*, 463 U.S. 1247, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983).

27. *Cf. Hall v. Hvide Hull No. 3*, 746 F.2d 294, 302-03 (5th Cir. 1984) (suggesting that pre-*Executive Jet/Foremost Ins. Co.* test for maritime tort codified in § 905(b) by 1972 amendments to LHWCA); *but see Drake v. Raymark Indus., Inc.*, 772 F.2d 1007, 1017-18 (1st Cir. 1985) (rejecting *Hall's* "codification" theory).

28. 457 U.S. 668, 673, 102 S.Ct. 2654, 2657, 73 L.Ed.2d 300, 305 (1982).

29. 409 U.S. at 253, 93 S.Ct. at 497, 34 L.Ed.2d at 459; *see also Victory Carriers, Inc. v. Law*, 404 U.S. 202, 204, 92 S.Ct. 418, 420, 30 L.Ed.2d 383 (1971).

[7] May's injury did not occur on navigable waters. May's claim, therefore, fails to meet the test for a maritime tort, just as it fails to meet the test to establish admiralty jurisdiction. As *Drake* states, § 905(b) "implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute."[30] Even if May can prove every fact he has asserted, he cannot show that any of the defendants committed a maritime tort. His claim, therefore, was properly dismissed by summary judgment on the merits, and the judgment is, therefore, affirmed.

WEST KEY NUMBER SYSTEM

30. 772 F.2d at 1014.